UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DONGDONG HUANG,

Plaintiff,

VS.

CONTINENTAL TIRE THE AMERICAS, LLC, a foreign limited liability company,

Defendant,

Case No. 2:10-cv-12598-ADT-PJK

HON. ROBERT CLELAND

JEFFREY T. MEYERS (P34348)
JUSTIN J. HAKALA (P72996)
Attorneys for Plaintiff
3200 Greenfield, Suite 260
Dearborn, MI 48120-1802
(313) 961-0130 Fax: 8178
jmeyers@morganmeyers.com
jhakala@morganmyers.com

JOHN BLAISE GSANGER
Co-Counsel for Plaintiff
802 N. Carancahua, Ste. 1400
Corpus Christie, TX 78403
(361) 698-7600 (Fax: 7614)
JGSANGER@EDWARDSFIRM.COM

EDWARD M. KRONK (P16258)
HERBERT C. DONOVAN (P51939)
MAUREEN T. TAYLOR (P63547)
Attorneys for Defendant
401 South Old Woodward, Ste. 400
Birmingham, MI 48009
(248) 971-1719
kronk@ bwst-law.com
donovan@ bwst-law.com
taylor@bwst-law.com

PLAINTIFF'S RESPONSE TO CONTINENTAL'S MOTION TO EXCLUDE EVIDENCE OR, IN THE ALTERNATIVE, MOTION IN LIMINE REGARDING DISSIMILAR TIRES

COMES NOW the Plaintiff DongDong Huang, and files Plaintiff's Response to Continental's Motion to Exclude Evidence or, in the Alternative, Motion in Limine Regarding Dissimilar Tires *[Doc. 55]*, and in support thereof, would show the Court as follows:

CONCISE STATEMENT OF ISSUES

I. Whether the Court should admit the following evidence:

a. Documents providing information regarding other tires manufactured by Defendant and whether those tires incorporate the safer alternative tire designs asserted by Plaintiff as technologically and economically feasible alternative designs which should have been used to mitigate the risk of a tire tread separation;

b. Documents proving information regarding other prior incidents involving the same failure mode of tires made at the same tire plant, of which Defendant has knowledge;

c. Documents produced in two previous actions involving substantially similar issues in connection with tires made at the same tire plant and which Plaintiff's counsel is already familiar with from his involvement in those prior cases; and

d. Information regarding (1) bad manufacturing practices and poor manufacturing conditions at the Mount Vernon plant and (2) the design procedure and decision making process regarding design changes in Continental tires as evidenced from information contained in documents listed in (a) – (c).

The Evidence at Issue

A. Alternative Tire Designs

Mr. Huang has raised negligent design claims. *Doc. No. 7¶¶ 26-28.* As part of his burden of proof in this case, Mr. Huang must show "that there was a reasonable alternative design available; … that the available alternative design was practicable; [and] that the available and practicable reasonable alternative design would have reduced the foreseeable risk of harm posed by defendant's product." *Fleck v. Titan Tire Corp.*, 177 F.Supp.2d 605, 613-14 (E.D. Mich. 2001) (citing *Hollister v. Dayton Hudson Corp.*, 201 F.3d 731, 738 (6th Cir. 2000)). "Evidence of an alternative design of a safer product is admissible and probative to prove design defect in a products liability case." *Jackson v. Firestone Tire & Rubber Co.*, 788 F.2d 1070, 1078 (5th Cir. 1986) (citing *Mitchell v. Fruehauf Corp.*, 568 F.2d 1139 (5th Cir. 1978)). Despite the fact that Mr. Huang must offer proof of alternative designs, Continental has moved to exclude any evidence involving any tire design other than the design of the tire that failed. *Doc. No. 55.* Numerous cases from across the country have rejected the related argument that discovery of such information should be limited to the specific tire design of the tire which failed:

> Continental argues that information regarding tires other than the model at issue is not discoverable until plaintiff demonstrates that the other tires are "substantially similar." … The magistrate judge held that at this stage, plaintiff was entitled to investigate whether tires were similar with respect to these traits despite being a different size than the allegedly defective tire. *Id*. ("So saying that a tire is of a particular size doesn't really speak to those, ... given that the issue here is whether the inner liner, the steel belt skim stock, the wedges in these cap plies are somehow making a difference in terms of the steel oxidizing, or rusting, and ultimately the tire failing due to

> separat[ion] of the belts."). If products share the specific design features alleged to be defective, it may be that other differences between the products, such as tire size, are "immaterial." … Here, plaintiff seeks in part to discover whether the products are dissimilar, which may reveal that the other tires presented a superior, safer design that should have been used for the subject tire. Transcript at 7. The jury will need to determine whether the disputed tire "is performing as good as other sets of tires, or much worse than other sets of tires, or even better than other sets of tires." *Id*. Of course, the safety of another tire will be relevant only if the other tire is similar enough to the one at issue that the two could have shared a common design. Nonetheless, the alternative theory of relevance recognized by the magistrate judge implicates a broader sense of similarity…. The distinction between admissibility at trial and discoverability is especially significant where, as here, a threshold question is factually intensive. Information necessary to determine whether products are similar will ordinarily be within the control of the manufacturer and/or designer. The rules cannot be read as imposing a "Catch-22" that would require proof of similarity before a party may discover evidence of similarity…. In summary, the magistrate judge did not abuse his discretion by ordering discovery regarding tires other than the specific tire at issue without a more extensive showing of substantial similarity.

Albee v. Continental Tire North America, Inc., No. CIV. S-09-1145 LKK/EFB, 2010 WL 1729092 *6-*9 (E.D. Ca. 2010).[1] Accordingly, Mr. Huang requested and gathered information about other tires Continental made with specific alternative tire design features as relevant and necessary to the allegations in paragraphs 26 through 28 of his complaint. Mr. Huang intends to use this evidence to show the existence of economically and technologically feasible alternative designs, and Continental's awareness of such.

---

[1] *see also In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1183, 1191-92 (10th Cir.2009) (rejecting the tire manufacturer's argument that discovery should be limited "to the design of the Green Tire Specification ['GTS'] at issue" and holding that when "the plaintiffs' theory of the case includes the argument that [the tire manufacturer] was on notice of the tread separation problem," discovery properly included "information on tires manufactured to specifications other than GTS" for particular tire that failed); *Cooper Tire & Rubber Company v. Rodriguez*, 2 So.3d 1027, 1029-31 (Fla. 3d DCA 2009) ("The manufacturing techniques and procedures employed to construct the Cobra model radial tires involved in the plaintiff's accident are not unique to the tires manufactured to the same GTS. Therefore … discovery of documents related to Cooper tires other than those manufactured to the same GTS" is proper); *Anton v. Goodyear Tire & Rubber Co.*, Civil Action No. H-06-3221, 2007 WL 2688433, *2 (S.D. Tex. Sep. 10, 2007) ("Goodyear objects to plaintiffs' request first because it seeks discovery related to tires other than the G159 model in this case … The court has ruled in a separate order that plaintiffs may pursue discovery related to G670 and G391 tires suitable for use on motor homes. Thus, Goodyear's objection to the breadth of plaintiffs' request is overruled."); *Ex parte Cooper Tire & Rubber Co.*, 987 So.2d 1090, 1103 (Ala. 2007) (holding that "the manufacture of the tires was to a large extent standardized and that the particular design and manufacturing process was substantially

B. Prior Claims Involving the Same Failure Mode of Tires Made at the Same Plant

Proof of Mr. Huang's claims will entail evidence "that the severity of the injury was foreseeable by the manufacturer; … that the likelihood of occurrence of her injury was foreseeable by the manufacturer at the time of distribution of the product; … [and] that the available and practicable reasonable alternative design would have reduced the foreseeable risk of harm posed by defendant's product." *Fleck v. Titan Tire Corp.*, 177 F.Supp.2d 605, 613-14 (E.D. Mich. 2001) (citing *Hollister v. Dayton Hudson Corp.*, 201 F.3d 731, 738 (6th Cir. 2000)). Prior lawsuits and complaints involving similar products

---

the same, regardless of a particular model. Thus, the discovery in this case is directed toward detailing the instances in which Cooper's design and manufacturing process has resulted in tires that failed as a result of tread separation, regardless of the particular size or tread pattern of the tire"); *Mann ex. rel. Akst v. Cooper Tire Co*., 33 A.D.3d 24, 35, 816 N.Y.S.2d 45 (N.Y. App. Div. 2006) (where Cooper Tire argued discovery be limited to same green tire specification, the court held "there is simply no … rationale … that suggests that tread separation is limited to either one or a range of green tire specifications…. thus the scope of discovery in this case should include documents relating generally to the tread separation defect or problem. To rule otherwise would mean, as the plaintiffs assert, that Cooper Tire would not produce documents in which tread separation and foreign object contamination is discussed generally.... [W]e agree, that such information is of 'vital importance irrespective of the make of tire involved [since] it contains evidence of what Cooper Tire knew of belt and tread separations.' ... [T]o limit disclosure to 'same green tire specifications' rather than to tires with the same defect of tread separation is an 'absurdity since Cooper Tire will be able to conceal documents probative on the issues of notice, defectiveness and dangerousness. For the same reasons, it would be absurd to limit disclosure to the same plant as the one where the subject tire was manufactured"); *Petersen v. DaimlerChrysler Corp*., No. 1:06-cv-00108-TC-PMW, 2007 WL 2391151, at *3 (D.Utah 2007) (holding that "limiting discovery in the fashion Cooper proposes would be premature and could potentially deprive Plaintiffs of discovery supporting that theory" of liability in the complaint).

are relevant "to establish notice or the existence of a defect, or to refute testimony … that a given product was designed without safety hazards[, or] to prove notice or awareness of the potential defect." *Cardenas v. Dorel Juvenile Group, Inc.*, 230 F.R.D. 611, 633 (D. Kan. 2005) (citing Fed. R. Civ. P. 26(b)(1); *Lohr v. Stanley-Bostitch, Inc.*, 135 F.R.D. 162, 164 (W.D. Mich.1991); *Ponder v. Warren Tool Corp.*, 834 F.2d 1553, 1560 (10th Cir.1987); *Rexrode v. Am. Laundry Press Co.*, 674 F.2d 826, 829 n. 9 (10th Cir.1982); *Orleman v. Jumpking, Inc.*, No. Civ. A. 99-2522-CM, 2000 WL 1114849, at *2 (D.Kan. July 11, 2000)); *see also Nickell v. Flight Options, LLC*, No. 3-10-CV-1323-D, 2010 WL 3784497, at *3 (N.D.Tex.2010) ("discovery concerning [similar] lawsuits is reasonably calculated to lead to the uncovering of substantially similar occurrences," citing *Lohr v. Stanley-Bostitch Inc.*, 135 F.R.D. 162, 164 (W.D. Mich. 1991)). Therefore, Mr. Huang requested and gathered information regarding prior lawsuits and complaints involving similar products. The discovery produced in this case was not limited to claims and complaints involving the exact same model of product; some of the documents refer to and involve other Continental products alleged to have the same defect:

> On the issue of admissibility, it is now well settled that evidence of similar accidents is admissible to prove the existence of a particular defect, to prove causation, or to prove defendant's knowledge of the danger. *See Koloda v. General Motors Parts Division*, 716 F.2d 373, 375-76 (6th Cir.1983). … At the present stage of litigation, however, admissibility is not the sole criterion. In order to be entitled to discovery concerning other incidents, plaintiff need not lay the same foundation concerning substantial similarity as would be necessary to support admission into evidence. *See Uitts v. General Motors Corp.*, 58 F.R.D. 450, 452-53 (E.D.Pa.1972). For discovery purposes, the court need only find that the circumstances surrounding the other accidents are similar enough that discovery concerning those incidents is reasonably calculated to lead to the uncovering of substantially similar occurrences. *Id.*; *see Peterson v. Auto*

> *Wash Mfg. & Supp. Co.*, 676 F.2d 949, 953 (8th Cir.1982); *Kramer v. Boeing Co.*, 126 F.R.D. 690, 692-95 (D.Minn. 1989).

Lohr v. Stanley-Bostitch, Inc., 135 F.R.D. 162, 164 (W.D. Mich. 1991). Accordingly, Mr. Huang intends to use evidence of claims involving the same failure mode as relevant and necessary to prove the allegations in paragraphs 26 through 28 of his Complaint.

Continental would misconstrue the concept of "substantially similar tires" to include only "identical tires." This is unquestionably the wrong standard. "Evidence of similar incidents or accidents is admissible to prove the existence of a particular defect, to prove causation, or to prove defendant's knowledge of the danger." *Koloda v. General Motors Parts Division*, 716 F.2d 373, 375–76 (6th Cir.1983). "The 'substantially similar' predicate for the proof of similar accidents is defined ... by the defect ... at issue." *Jackson v. Firestone Tire & Rubber Co.*, 788 F.2d 1070, 1083 (5th Cir. 1986). "[T]he standard for admitting prior accidents should be relaxed if the accidents are used merely to show notice of a dangerous condition." *Rye v. Black & Decker Mfg. Co.*, 889 F.2d 100, 102 (6th Cir.1989). "Substantial similarity means that the accidents must have occurred under similar circumstances or share the same cause." *Id.* "In determining whether accidents are 'substantially similar,' the factors to be considered are those that relate to the particular theory underlying the case." *Ponder v. Warren Tool Corp.*, 834 F.2d 1553, 1560 (10th Cir.1987). Once the court has determined that accidents are sufficiently similar, "[a]ny differences in the circumstances surrounding those occurrences go merely to the weight to be given the evidence." *Id*. "Evidence of similar accidents occurring under substantially similar circumstances and involving substantially similar products may be probative ... [of any number of factors]." *Brazos River Auth. v. GE Ionics*, 469 F.3d 416, 426 (5th Cir. 2006) (citing *Jackson*, 788 F.2d at 1083).

C. Evidence from the Lampe and Albee Cases

Mr. Huang intends to use evidence produced in this case which were previously produced in two prior cases involving similar design and manufacturing defect claims arising from the tread separation of Continental tires made at the same Mount Vernon plant where the tire at issue was made: *Albee v. Continental Tire North America Inc.*, No. S-09-1145 (E.D. Cal.), and *Lampe v. Continental General Tire, Inc.*, No. BC173567 (L.A. Cal. Sup. Ct.).

Mr. Huang's case, the *Lampe* case, and the *Albee* case all involve claims about tire manufacturing problems at Continental's Mount Vernon plant. The discovery in the *Lampe* and *Albee* cases confirms many of the allegations in paragraphs 13 through 23 and 38 of Mr. Huang's Complaint. *Doc. No. 7.* Documents produced in the *Lampe* and *Albee* cases also corroborate the tire design defect allegations in paragraphs 26 through 28 of Mr. Huang's Complaint. *Id.*

Mr. Huang makes specific allegations about the improper manufacturing conditions and practices at Continental's Mount Vernon, Illinois tire plant where the tire at issue was made. *Doc. No. 7¶¶ 13-23, 38.* To prove these allegations, Mr. Huang intends to use testimony and documents from the *Lampe* and *Albee* cases to show evidence of bad manufacturing practices and poor manufacturing conditions at the Mount Vernon plant in the 1990s, and Continental's knowledge of the same.

Mr. Huang makes specific allegations regarding safer alternative tire designs that were technologically and economically feasible to Continental, and which should have been used to mitigate the risk of a tire tread separation when designing the tire at issue. *Doc. No. 7¶¶ 26-28.* To prove his allegations, Mr. Huang intends to use testimony and documents from the *Lampe* and *Albee* cases to show evidence of the design procedures and decision-making process regarding design changes at the Mount Vernon plant, in addition to proving when alternative tire designs were available.

Mr. Huang does not intend to use testimony and documents from the *Lampe* case to prove that the *Lampe* tire was defective. Nor does he intend to use documents from the *Albee* case to prove that the *Albee* tire was defective.

WHEREFORE, PREMISES CONSIDERED, the Plaintiff prays that this Court deny Continental's motion to exclude evidence regarding dissimilar tires and for all such further relief which they may show themselves justly entitled to at law or in equity.

Respectfully submitted,

MORGAN & MEYERS, PLC

BY: s/Justin J. Hakala
JEFFREY T. MEYERS (P34348)
JUSTIN J. HAKALA (P72996)
Co-Counsel for Plaintiff
3200 Greenfield, Suite 260
Dearborn, MI 48120-1802
(313) 961-0130 (Fax: 8178)
jhakala@morganmeyers.com

THE EDWARDS FIRM

JOHN BLAISE GSANGER
Co-Counsel for Plaintiff

802 N. Carancahua, Ste. 1400
Corpus Christi, TX 78403
(361) 698-7600 (Fax: 7614)
jgsanger@edwardsfirm.com

Dated: February 21, 2012

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2012, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all attorneys or parties of record, and I hereby certify that I have sent copies to all non-ECF parties, if any, by first class U.S. Mail.

MORGAN & MEYERS, PLC

BY: s/Justin J. Hakala
JUSTIN J. HAKALA (P72996)
Attorneys for Plaintiff
3200 Greenfield, Suite 260
Dearborn, MI 48120-1802
(313) 961-0130 (Fax: 8178)
jhakala@morganmeyers.com